

McCormick Freedom Museum
Constitutional Rights Foundation Chicago

EDUCATING FOR DEMOCRACY:
CREATING A BLUEPRINT FOR ILLINOIS HIGH SCHOOLS

BRINGING THE CONSTITUTION TO LIFE
IN ILLINOIS HIGH SCHOOLS

Diane P. Wood
Circuit Judge, U.S. Court of Appeals for the 7th Circuit
Senior Lecturer in Law, The University of Chicago Law School

Good evening. It is a great pleasure to be part of this effort to bring our great democratic tradition alive for high school students all over our state. I can hardly imagine a better time to be doing this: it is the best of times, it is the worst of times. The best of times, because we have just seen a Presidential election in which young people from all over the country became deeply involved and learned that their voice matters greatly; the worst of times, because we have also just seen the state constitutional processes at work to remove a governor from office who, according to the charges brought by the Illinois House and the unanimous vote of the Illinois Senate, had become unfit for office. The challenge before us is how best to

take these kinds of events, as well as more routine matters that touch upon constitutional rights, and move them into the classrooms of our high schools.

Although at first glance it might seem that the law is too inaccessible, too specialized, or too erudite for the average high school student, that impression would be quite mistaken. In fact, the Supreme Court and the lower federal courts deal regularly with problems that any student would recognize immediately as pertinent to his or her life. In the time available this evening, I will review some Supreme Court cases addressing three broad issues – fair procedures (as addressed in the Fifth and Fourteenth Amendments), the right to free speech under the First Amendment, and the right not to be subjected to unreasonable searches under the Fourth Amendment. Almost all of the cases I have selected arise, in one way or another, in schools. With these cases in mind, I invite you over the next day and going forward to think about ways in which this material might be presented to the students, so that they will begin to understand that law isn't just for lawyers, that the Constitution matters deeply to them, and that they have a

responsibility (just as all citizens do) to live up to, and to uphold, its great traditions.

I. Procedural Due Process Decisions

Before going into any detail about the cases that deal with the kinds of procedures that apply to various actions that school districts take, a few words of introduction to this complex area of law are in order. First, the requirements of due process apply only to governmental actors – federal, state, or local. We are therefore not talking about duties imposed on private schools. Second, even with respect to state actors, constitutional protection exists only for certain deprivations: that is, life, liberty, or property (note – *not* “the pursuit of happiness – we mustn’t confuse the Constitution with the Declaration of Independence). So, for example, a student probably could not complain of a deprivation of due process if she were assigned to Teacher Smith rather than Teacher Jones for Mathematics, even if everyone in the school thought that Jones is the better teacher. One simply does not have either a liberty or property interest in that kind of placement decision. But, as we’ll see, if the student is suspended from school as a disciplinary

measure, matters are different. Students *do* have enough of a property interest in attending school to trigger the protections afforded by the Constitution. Finally, the question always arises “how much procedure is enough?” Classically, one needs notice, an opportunity to be heard, and an impartial decisionmaker. But the details can vary greatly – so greatly that the leading Supreme Court decision offers only the broadest kind of guidance to this area. That case, called *Mathews v. Eldridge*,¹ gave us the following test:

... Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. ... [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²

As we move through the procedural due process cases that have arisen in the educational context, therefore, we need to keep this balancing test in mind.

One of the first and still one of the most important cases applying the principles of constitutional due process to the public schools setting is *Goss v. Lopez*.³ *Goss* gives us an example of a case in which the Supreme Court held that an immediate suspension of a student without a hearing violated that student's due process rights. The facts are interesting. At least nine named students, including Dwight Lopez, were suspended from school for 10 days for destroying school property and disrupting the learning environment. (Lopez actually testified that at least 75 students were suspended from the school on the same day; the Court had no occasion to decide what was the correct number, as this made no difference to the ultimate outcome of the case). Ohio state law specified that schools had the right to suspend so-called problem students without a hearing. Lopez and the other named plaintiffs filed suit in federal court alleging that the suspension without a hearing violated their 14th Amendment Due Process rights. Lopez also testified that he was not in fact a party to the destructive conduct, but an innocent bystander, and that this was something that would have come out in a proper pre-suspension hearing.

The Court held that even though there is no federal constitutional right to a public education, that was not the end of the story. Ohio, like virtually every state, has chosen to implement a public education system, and it makes school attendance mandatory. Under these circumstances, Ohio could not deprive the students of their right to attend school without due process of law. Students have a legitimate expectation to education, and this is something that qualifies as a property interest protected by the 14th Amendment. Once that much is established, it follows that the state cannot deprive the student of that interest without adhering to some minimum procedures. In fact, the Court also found that suspension without a prior hearing also deprives the student of a liberty interest, given the fact that the student's name and integrity is in question. The bottom line was that some kind of pre-deprivation hearing was constitutionally required. The risk of error, the Court said, is not trivial "and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."

My second example of an application of the norms of procedural due process will resonate with both students and adults. It is *Mackey v. Montrym*,⁴ and it deals with the procedures that the government must follow when it suspends a person's driver's license. In May 1976, Donald Montrym was driving his car when he collided with another vehicle. The police officer who arrived on the scene observed that Montrym was glassy-eyed and unsteady on his feet; he was slurring his speech, and he smelled strongly of alcohol. Not surprisingly, the officer arrested Montrym for operating his vehicle while under the influence of alcohol. He took Montrym to the police station, but, when Montrym was asked to take a breathalyzer test, he refused. Later, Montrym thought better of it, and asked to take the test, but he was too late. The relevant Massachusetts statute requires the arresting officer to prepare a written report immediately. It imposes a penalty of a 90-day suspension of the license on persons who refuse to take the test. In subsequent state court proceedings, the complaint of DUI against Montrym was dismissed (it is unclear why but it seems to be because the police refused to administer the test when Montrym

asked for it). Montrym's lawyer told the Registrar of Motor Vehicles about the state court's action and requested that any suspension of his license be stayed. Unfortunately, however, under the statute the Registrar was not authorized to stay a suspension, and so he issued a suspension notice to Montrym and directed him to surrender his license by mail at once. Montrym complied, but he also wrote a letter to the Board of Appeal, threatening to file suit if his license were not returned immediately. Montrym then brought an action in federal court against the Registrar of Motor Vehicles of Massachusetts, in which he argued that Massachusetts had violated his 14th Amendment Due Process rights by depriving him of his property rights (that is, suspending his license) without affording him a full hearing before the deprivation occurred.

Relying on the general *Mathews v. Eldridge* formula, the Supreme Court looked at first, Montrym's private interest in his driver's license, second, the risk of an erroneous deprivation of that interest given the procedures that the state was using, third, the value of any additional procedures, and finally, the governmental interests at stake. With respect to the first of those points, it noted

that while Montrym had a substantial interest in his continued possession and use of his license in the abstract, the magnitude of that interest was tempered by the brief duration of any possible wrongful deprivation (90 days) and the availability of an immediate post-suspension hearing. Indeed, the statute did provide for an immediate post-suspension hearing that can be requested by the driver (an option which, oddly, Montrym did not pursue).

Turning to the second and third *Eldridge* factors, the Court observed that due process does not require procedures that are so comprehensive as to preclude any possibility for error. (It is worth noting, at this juncture, that the Court draws a sharp line between the procedures required in criminal trials and those required in the kind of administrative hearings we are likely to see in the schools or in other day-to-day settings.) Ordinarily something less than a formal evidentiary hearing, complete with lawyers on sides, full cross-examination, and maybe even a jury, is sufficient prior to an adverse administrative action. Especially if a comprehensive post-deprivation hearing review is available, it is generally enough to have pre-deprivation procedures that do no more than provide a

reasonably reliable basis for concluding that the facts justifying the action are those that the responsible government official puts forth. In Montrym's case, the Massachusetts DUI statute requires objective facts that are within the personal knowledge of an impartial government official or that are readily ascertainable by him. The risk of erroneous observation or deliberate misrepresentation by the officer in the ordinary case "seem[ed] insubstantial" to the Court. It therefore concluded that the risk of error from the abbreviated procedures that Massachusetts used was not very high, and thus there was no reason to require a more substantial hearing before the person's driver's license could be suspended.

Finally, looking at the governmental interest factor, the Court acknowledged that the Massachusetts statute is aimed at protecting public safety, and that traditionally states have enjoyed considerable leeway in adopting summary procedures to protect public health and safety. Massachusetts's law was designed to deter drunken driving and to induce people to submit to the breathalyzer. The test, in turn, supports the state's interest in obtaining reliable evidence and

removes impaired drivers from the road promptly. It thus contributes to highway safety. The suspension sanction serves these objectives, and taking the time and money for a pre-suspension hearing would substantially undermine the state's interest. The increase in hearings, the Court accepted, would impose a substantial fiscal and administrative burden on the state.

Many of these themes – the significance of the individual's interest, the importance of the state's interest, and the way the two might be reconciled – recur in cases arising under different provisions of the Constitution. And, as we'll see in the First Amendment cases to which I'm about to turn, the Court has tried to be sensitive to the special problems raised by the youth of children at the pre-collegiate level and the unique responsibilities that school administrators and teachers have with respect to their students.

II. First Amendment Speech Cases

There are really at least three lines of First Amendment cases that have arisen in the public schools: those dealing with freedom of speech, those dealing with freedom the press, and those dealing with the Religion Clauses (the Establishment Clause and the Free

Exercise Clause). Without meaning in any way to suggest that one group of decisions is less important or less interesting than another, I have chosen in the interest of time to focus on two free speech cases (although the first one also implicates the Religion Clauses to a degree). The case is called *Lamb's Chapel v. Center Moriches Union Free School District*.⁵ It arose in New York and involved the rules and regulations that the local school board had issued with respect to the use of school property when that property was not being used for school purposes. The Board of this particular district had enacted rules permitting after-hours use of its schools for two purposes: first, civic or recreational use, and second, use by political organizations. On two occasions, an evangelical church known as Lamb's Chapel, and its pastor John Steigerwald, applied to the District for permission to use school facilities after school for purposes of showing a six-part film series of lectures by Dr. James Dobson. Dr. Dobson, according to a brochure that Lamb's Chapel gave the District, was a licensed psychologist, former associate clinical professor of pediatrics and the University of Southern California, and a best-selling Christian author and radio commentator. The

series presented Dr. Dobson's view that the media was undermining basic values that the only way to counterbalance these invidious influences was by returning to traditional, Christian family values. The Board refused Lamb's Chapel's request, on the grounds that the film appeared to be church-related, and that it was forbidden by New York law from allowing after-hours use of facilities for religious purposes. Lamb's Chapel sued, arguing that the District had offended its First Amendment free *speech* rights.

In a unanimous decision written by Justice White, the Court agreed with Lamb's Chapel. The Court said that if the opinions expressed in the film had not taken a religious perspective, then undoubtedly the District would have given its permission for the after-school program presenting the films. What the District did, then (the Court said), was to deny the showing of the films because of the message they expressed. This was nothing more or less than viewpoint discrimination, which is strictly forbidden by the First Amendment. The Court was unmoved by the District's argument that it should be permitted to deny the use of its property for the

purposes of evangelical proselytizing because allowing proselytizing would lead to threats of public unrest and violence.

Contrast the Court's approach to a different message in its 2007 decision in *Morse v. Frederick*,⁶ known to many as the "Bong Hits" case. In January 2002, the Olympic torch relay passed through Juneau, Alaska, on its way to Salt Lake City, Utah, for the Winter Olympic Games. Because the torch was to proceed directly past Juneau-Douglas High School, principal Deborah Morse permitted staff and students to leave class and watch the torch relay from the side of the street. Joseph Frederick, then a senior at Juneau-Douglas High School, arrived late to school on the day of the torch relay. When he arrived, he immediately joined his friends on the side of street opposite to the school. As the torchbearers and camera crews passed by Frederick and his friends, they unfurled a 14-foot banner that read "BONG HiTS 4 JESUS." Morse immediately crossed the street and demanded that the banner be taken down; everyone but Frederick complied. Morse then confiscated the banner and told Frederick to report to her office. When he got there, he learned that the principal was suspending him for 10 days.

Morse's explanation for suspending Frederick was that the banner encouraged illegal drug use in violation of school policy. Frederick appealed his sentence to the Superintendent of the school district, who upheld the suspension, agreeing with Morse's reasoning. Frederick then filed suit in federal court, arguing that the school board and Morse had violated his First Amendment rights.

The case eventually made its way to the Supreme Court, where the question was whether Frederick had a right protected by the First Amendment's free speech provision to hold up his banner as he did. The majority held, in an opinion authored by Chief Justice Roberts, that Morse did *not* violate Frederick's free speech rights because the banner was displayed during a school-supervised event, making the case a "school speech" case, rather than a "normal" speech case involving speech in a public place. In so holding, the Court had to distinguish an earlier case dealing with the free speech rights of students, *Tinker v. Des Moines Independent Community School District*.⁷ In *Tinker*, the Court had famously written that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." And the

Court meant it, in *Tinker*: it held there that students could not be suspended for wearing black armbands as a symbol of opposition to the War in Vietnam.

In *Frederick*, however, the Court saw a more complex situation. It began with the proposition that the First Amendment rights of students in K-12 schools are not as broad as those of adults in other settings. Although the court's majority acknowledged that the "Bong Hits" message was cryptic (Frederick insisted that the message had no meaning and that it was simply an attempt to get the attention of the cameras), it was an undeniable reference to illegal drugs. Furthermore, the Court held, it was reasonable for Principal Morse to conclude that Frederick's banner advocated the use of illegal drugs.

At that point, the Court was on familiar ground. The government, it said, has an important, "perhaps compelling" interest in deterring drug use by students; the problem of youth drug abuse, according to statistics it cited, is a serious one. One purpose of a school is to educate students about the danger of illegal drugs and to deter their use. Peer pressure is thought to be a central

reason for drug use, and, the Court thought, Principal Morse was entitled to view the banner as a type of peer pressure. Chief Justice Roberts wrote that Morse's action of removing the banner and suspending Frederick "would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use." The First Amendment, he summed up, "does not require schools to tolerate at school events student expression that contributes to those dangers."

One question that these two cases leave open is the extent to which school administrators are entitled to regulate the content of student speech, or speech to which students are exposed. We have an example of out-and-out content regulation in *Frederick*, and we have a counter-example of a refusal to regulation on the basis of content in *Lamb's Chapel*. What is the difference? Is it the message – potentially encouraging illegal or unhealthful behavior in one case, while advocating a particular religious message in the other? Is it the identity of the speaker – a student in one case, and an adult provider of an after-school program in the other? Is it the age or maturity of the students – and if it is this, then why should someone

who is legally an adult (that is, over the age of 18) be subject to the same regulations as a younger person? These and other cases give ample room for discussion about the scope of the First Amendment Speech Clause and what it really means for students.

III. Fourth Amendment Decisions

The Fourth Amendment is always a fruitful area for constitutional discussion, because the factual variations in the cases are endless, everyone has watched television shows where the police knock on a door and announce “We Have a Warrant,” and the national debate about the proper limits of police power over private spaces is, if anything, more intense today than ever. I’m going to describe three cases for you – one arising from the school setting, one that is more general, and one that the Supreme Court has just decided to hear.

The first is called *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.⁸ It involved a challenge by a student to the policy of the school district of Tecumseh, Oklahoma, that required all middle and high school students to consent to drug testing by urinalysis as a condition of

participating in any extracurricular activities whatsoever, including not only athletics, but also the Academic Team, Future Farmers of America, Future Homemakers of America, band and choir. Under the policy, students had to consent to random drug testing at any time. The tests were designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medicines. Lindsay Earls, a member of the Academic Team, show choir, marching band, and National Honor Society brought suit in federal court challenging the policy as contrary to his Fourth Amendment rights.

The Court held that the policy did not violate the Fourth Amendment's guarantee against unreasonable searches. The policy, it found, reasonably served the school district's important interest in detecting and preventing drug use among its students. Justice Thomas, writing for a 5–4 majority, said that the affected students had a limited expectation of privacy because they were in a public school environment, where the State is responsible (and must be able to take effective measures) for maintaining discipline, health,

and safety. Justice Thomas also wrote that the method of testing was not impermissibly intrusive because the urine samples were produced behind closed restroom stall doors, all results were kept in confidential files, and the test results were not turned over to any law enforcement authority. Finally, the Court considered the nature and immediacy of the district's concerns and how effectively the policy might meet them. In language similar to what we saw in the later Frederick case, Justice Thomas noted that drug use was rampant in schools and the Pottawatomie County district presented specific evidence of drug use in the Tecumseh schools. In light of that evidence and the nationwide epidemic of drug use, the Court held that the school district's policy did not violate the Fourth Amendment.

The case of *Chandler v. Miller*,⁹ decided five years earlier than *Pottawatomie County*, offers an interesting contrast. In *Chandler*, candidates for high state office in Georgia were required to certify that they had taken a drug test and that the result was negative. Before a person could have his or her name placed on the ballot for state-wide office, that potential candidate had to submit a form

certifying that he or she had submitted to urinalysis and that the results were negative. Petitioners were Libertarian Party nominees for state offices including Commissioner for Agriculture, Lieutenant Governor, and the General Assembly; they argued that the urinalysis requirement violated their Fourth Amendment rights.

The Court agreed with the petitioners, stating that although the testing method was “reasonably non-invasive,” Georgia failed to show any substantial need for searching its political candidates in this way. The Court rejected Georgia’s argument that the testing was needed because drug use was incompatible with holding high office and because drug use draws into question an official’s judgment and integrity. The Court found that Georgia did not present any “concrete danger” of drug use in state offices in Georgia and that, in any event, ordinary law enforcement methods would suffice to apprehend any individuals who were either addicted or scofflaws.

Last, and of special interest for people creating curricula right now, is the Ninth Circuit’s *en banc* decision in *Redding v. Safford*

Unified School District #1, which the Supreme Court has just agreed to hear and will probably decide during this Term, if the briefing schedule it has set is any indication. ¹⁰ *Redding* really presents two questions, one of which will be more interesting to a high school audience than the other. The merits question is whether officials of the Safford Unified School District in Arizona violated the rights of eighth-grader Savana Redding when, in a search for prescription-strength ibuprofen pills, it required her to submit to a strip search in the nurse's office, during which her bare breasts and pubic area were exposed to female school officials. At no point – not when the assistant principal was questioning Savana, not when he searched her planner, not when he searched her backpack, and not when the school nurse and other officials required her to remove her clothes a layer at a time – did anyone find a single pill. Nor did the school officials contact her parents, either to find out whether she had a prescription for the ibuprofen, or to permit them to come and assist her, or for any other reason. The other question, which may prove to be even more important, is whether, even if the search violated Savana's rights under the Fourth Amendment, the law has

been so unclear in this area that the school officials are entitled to qualified immunity from suit. Qualified immunity is an important, but technical doctrine, that I would be happy to discuss if anyone is interested, but for now it is best to focus on the merits issue.

Once again, the case builds on an earlier decision, *New Jersey v. T.L.O.*,¹¹ which upheld the right of school officials to conduct a thorough search of a student's purse, once the vice principal had reasonable cause to believe that the student had been smoking cigarettes in violation of school rules, and then found rolling papers suitable for use with marijuana. In *T.L.O.*, the Court established a two-part inquiry for assessing the reasonableness of such searches. First, it said, "one must consider whether the ... action was justified at its inception," and then, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." This test was designed "neither [to] unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren."

Crucial in all of these cases is the level of generality at which analysis should take place. So, for example, is the question whether school officials may conduct a search for drugs, or is it whether they may conduct a *strip* search for *ibuprofen* pills that are the exact equivalent of two over-the-counter Advil tablets? Or is it some combination of those two questions? Is it enough to say, relying on the earlier cases we've been discussing, that school officials must be permitted to take action against "drugs," or are legal prescription drugs that are not susceptible to abuse different? Should it make any difference to either the initiation of the search or to its scope that the fellow student on whom the school officials found some of the *ibuprofen* pills said that she got them from Savana? Should it make any difference that the school officials had some experience with students becoming sick from pills they had received from other students, without any reason to think that Savana was the source of those pills?

The *Redding* case will give the Court an opportunity, once again, to discuss where these lines are drawn. The facts will undoubtedly strike a sympathetic chord in both the students now

attending high school and in the authorities who are faced with the daunting task of simultaneously respecting the privacy and growing autonomy of the adolescents in their care and enforcing both the laws and reasonable policies against drug use. I have no crystal ball, and thus I cannot tell you how the Supreme Court will decide the case. What I can say, however, is that (like *Morse v. Frederick* before it), this case presents a wonderful opportunity to teach high school students about the Constitution and why it matters to them.

* * * *

It should be clear by now that we have had time only to scratch the surface of Supreme Court cases that raise constitutional issues of direct relevance to high school students. There are countless more such cases being decided every month in the district courts and courts of appeals throughout the country. Finally, there is certainly no reason why high school students would not, or should not, be interested in the Supreme Court's business as a whole. Every Term, the Court confronts a substantial number of cases of national, and even global, interest. The more intelligent, educated

people are watching the Court's work and responding to it critically, the better our democracy will work.

I salute all of you for the fine work you are doing, and I stand ready to be of whatever assistance I may in furthering your mission.

Thank you.

¹ 424 U.S. 319 (1976).

² *Id.* at 334-35 (internal quotation marks and citations omitted).

³ 419 U.S. 565 (1975).

⁴ 443 U.S. 1 (1979).

⁵ 508 U.S. 384 (1993).

⁶ 127 S.Ct. 2618 (2007).

⁷ 393 U.S. 503 (1969).

⁸ 536 U.S. 822 (2002).

⁹ 520 U.S. 305 (1997).

¹⁰ See *Safford Unified Schl. Dist. #1 v. Redding*, No. 08-479, 2009 WL 104299 (U.S. Jan. 16, 2009).

¹¹ 469 U.S. 325 (1985).